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AHMAD MARSIDI ISMAIL v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
HARMINDAR SINGH DHALIWAL JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEAL NO: W-05(M)-163-04-2016]
5 JUNE 2017

CRIMINAL LAW: *Dangerous Drugs Act 1952 ('DDA') – Section 39B(1)(a) – Trafficking in 973g of cannabis – Drugs found under passenger's seat of accused's*
C *car – Whether accused had custody and control of drugs – Whether smell from cannabis connoted knowledge of cannabis in car – Findings of trial judge that accused had mens rea possession of drugs without recourse to presumption under s. 37(d) of DDA – Presumption of trafficking under s. 37(da) of DDA based on weight of drugs seized – Accused sentenced to death – Case of PP v. Abdul Rahman Akif*
D *– Whether applicable – Whether conviction and sentence safe – Whether ought to be substituted with conviction under s. 6 of DDA punishable under s. 39A(2) of DDA*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Drugs found under passenger's seat of accused's car – Whether accused had custody*
E *and control of drugs – Whether smell from cannabis connoted knowledge of cannabis in car – Whether trial judge erred in finding that accused had mens rea possession of drugs without recourse to presumption under s. 37(d) of DDA – Whether trial judge erred in finding that accused had knowledge of drugs based on smell emanating from drugs – Whether conviction and sentence safe – Whether ought to be set aside*

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The appellant was driving a Proton Saga ('the said car') when he was stopped by SP4, SP6 and L/Kpl Muhamad Ubaidillah. Upon searching the said car, SP4 found a red bag containing a plastic bag under the front passenger's seat next to the driver's seat. Inside the plastic bag, SP4 found slabs of compressed plant material which was later confirmed to be 973g of cannabis.
G The appellant was then charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case, the trial judge found that a *prima facie* case had been established by the prosecution. Applying the case of *PP v Abdul Rahman Akif,* the trial judge found that the appellant had custody and control of the illicit drugs as he was
H the only one in the car when the drugs were found. The trial judge also made a further contentious finding that the cannabis would emit a smell such that the appellant would know of the cannabis in the car. Therefore, the trial judge had come to a finding that the appellant had *mens rea* possession of the illicit drugs independently without recourse to the statutory presumption
I under s. 37(d) of the Act. For the element of trafficking, however, the trial judge invoked the presumption of trafficking under s. 37(da) of the Act after

taking into account the weight of the drugs seized. The appellant was accordingly found guilty, convicted and sentenced to death. Hence the present appeal. The issues that arose for determination, *inter alia*, were (i) whether the appellant had knowledge of the drugs that were recovered; and (ii) whether the trial judge was entitled to come to a finding that the appellant had knowledge of the illicit drugs based purely on the surrounding facts and circumstances.

Held (setting aside conviction and sentence and substituting with conviction under s. 6 of the Act punishable under s. 39A(2) of the Act; sentencing appellant to 20 years' imprisonment and ten strokes of whipping)

Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) In *PP v. Abdul Rahman Akif,* little effort was required to uncover what were in the three packages and as such it was held that possession was proven independent of the s. 37(d) presumption. However, unlike the case of *Abdul Rahman Akif*, the drugs in the instant case were in a red bag and also wrapped up completely such that more effort was again required to uncover the drugs contained in the package. Given the circumstances, the more appropriate way to impute knowledge of the appellant was through the use of the s. 37(d) presumption. (paras 16 - 18)

(2) There was no evidence that the cannabis had left a smell such that anyone entering the car would have sensed it. SP4 was only able to smell the cannabis after it had been uncovered from the package. If what the trial judge observed was indeed the case, the police officers inspecting the car would have said so in their evidence and more importantly would have zeroed in on the incriminating package based on the smell instead of having to exert some effort in locating the incriminating package. There was therefore, no basis for the trial judge to make his observations that the cannabis would emit a smell such that the appellant would know of the cannabis in the car. (para 19)

(3) There was no factual matrix adduced by the prosecution to infer that the appellant had knowledge of the illicit drugs in the car. The trial judge erred in finding that the appellant had knowledge of the drugs by way of inferences and from the circumstances of the case. The trial judge ought to have invoked the presumption under s. 37(d) of the Act and called upon the appellant to enter his defence only on an amended charge of possession under s. 6 of the Act and not trafficking. Trafficking had not been proved as there was only evidence of passive possession on the part of the appellant. (para 20)

A ***Bahasa Malaysia*** *Headnotes*

Perayu sedang memandu sebuah kereta jenis Proton Saga ('kereta tersebut') apabila dihentikan oleh SP4, SP6 dan L/Kpl Muhamad Ubaidillah. Ketika carian dibuat atas kereta tersebut, SP4 menemui sebuah beg merah yang mengandungi beg plastik di bawah kerusi penumpang depan bersebelahan
B dengan kerusi pemandu. Di dalam beg plastik tersebut, SP4 menemui ketulan mampat yang kemudiannya disahkan sebagai 973g kanabis. Perayu kemudiannya dipertuduh bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, hakim bicara mendapati bahawa kes *prima facie* berjaya dibuktikan oleh pendakwaan. Mengguna pakai kes
C *PP v. Abdul Rahman Akif*, hakim bicara mendapati perayu mempunyai jagaan dan kawalan dadah terhadap dadah tersebut kerana perayu berseorangan di dalam kereta ketika dadah tersebut ditemui. Hakim bicara juga membuat penemuan lanjut bahawa perayu mempunyai pengetahuan tentang dadah di dalam kereta tersebut oleh kerana bau kanabis tersebut. Oleh itu, hakim
D bicara mendapati bahawa perayu mempunyai '*mens rea* possession' dadah tersebut tanpa mengguna pakai anggapan berkanun di bawah s. 37(d) Akta. Walau bagaimanapun, bagi unsur pengedaran, hakim bicara membuat anggapan pengedaran dadah di bawah s. 37(da) Akta selepas mengambil kira berat dadah yang dirampas. Oleh itu perayu didapati bersalah, disabitkan dan
E dijatuhkan hukuman mati. Oleh itu rayuan ini. Isu yang timbul untuk pertimbangan, antara lain, adalah (i) sama ada perayu mempunyai pengetahuan tentang dadah yang dijumpai; dan (ii) sama ada hakim bicara berhak membuat keputusan bahawa perayu mempunyai pengetahuan tentang dadah berasaskan fakta dan keadaan sekeliling.

F **Diputuskan (mengetepikan sabitan dan hukuman dan diganti dengan sabitan bawah s. 6 Akta; menjatuhkan hukuman 20 tahun penjara dan sepuluh kali sebatan)**
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

G **(1)** Dalam *PP v. Abdul Rahman Akif*, sedikit usaha diperlukan untuk mendedahkan apa yang terdapat dalam ketiga-tiga paket dan oleh itu dianggap bahawa milikan telah terbukti bebas daripada anggapan s. 37(d). Walau bagaimanapun, tidak seperti kes *Abdul Rahman Akif*, dadah dalam kes ini berada dalam beg berwarna merah dan juga
H dibungkus sepenuhnya supaya lebih banyak lagi usaha diperlukan untuk mendedahkan dadah yang terkandung dalam paket tersebut. Berdasarkan hal keadaan, cara yang lebih sesuai untuk mengaitkan pengetahuan perayu adalah dengan mengguna pakai anggapan s. 37(d).

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(2) Tiada bukti bahawa kanabis telah meninggalkan bau sedemikian rupa sehingga sesiapa yang memasuki kereta tersebut akan mengesan baunya. SP4 hanya mampu mengesan bau kanabis tersebut selepas terdedah daripada bungkusan tersebut. Jika apa yang diamati oleh hakim bicara sememangnya berlaku, pegawai polis yang memeriksa kereta tersebut akan menyatakan sedemikian dalam keterangan mereka dan yang lebih penting lagi akan menjumpai paket kerana bau tersebut dan tidak perlu berusaha mencari paket tersebut. Oleh itu, tidak ada asas bagi hakim bicara untuk membuat pemerhatiannya bahawa kanabis akan mengeluarkan bau sedemikian rupa hingga perayu mengetahui kewujudan kanabis di dalam kereta.

(3) Tidak terdapat fakta matriks yang dikemukakan oleh pihak pendakwaan untuk membuat kesimpulan bahawa perayu mempunyai pengetahuan tentang dadah di dalam kereta tersebut. Hakim bicara terkhilaf dalam membuat dapatan bahawa perayu mempunyai pengetahuan tentang dadah tersebut melalui anggapan dan berdasarkan hal keadaaan kes tersebut. Hakim bicara sepatutnya mengguna pakai anggapan bawah s. 37(d) Akta dan memanggil perayu untuk memasuki pembelaannya hanya atas pertuduhan milikan terpinda di bawah s. 6 Akta dan bukan pengedaran. Pengedaran tidak dibuktikan kerana hanya terdapat bukti milikan pasif pada pihak perayu.

Case(s) referred to:
Chan Peon Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Fakhrurrazi Hasan v. PP [2017] 2 CLJ 125 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(dist)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Soorya Kumar Narayanan & Anor v. PP [2012] 9 CLJ 141 FC ***(refd)***
Surentheran Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A(2), 39B(1)(a)

For the appellant - Haresh Mahadevan & Ramzani Idris; M/s Haresh Mahadevan & Co
For the respondent - Azlinda Hj Ahad; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45A-84-11-2014 (varied).]

Reported by Sandra Gabriel

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JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] The appellant was charged in the High Court at Kuala Lumpur for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). The
B charge read as follows:

> Bahawa kamu pada 6.5.2014 jam lebih kurang 2.30 pagi, bertempat di Jalan Pria, Taman Maluri, di dalam daerah Wangsa Maju, di dalam Wilayah Persekutuan Kuala Lumpur, telah didapati mengedar dadah berbahaya jenis cannabis berat bersih 973 gram. Oleh itu kamu telah melakukan
C kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] After a trial, the appellant was found guilty of the offence as stated in the charge. He was accordingly convicted and sentenced to death by the High Court on 25 April 2016. The appellant then filed this appeal. The appeal was
D heard on 28 February 2017. At the conclusion of the submissions, we unanimously allowed the appeal. We set aside the conviction and sentence passed by the High Court and substituted in its place a conviction under s. 6 of the Act punishable under s. 39A(2) of the same. After hearing the mitigation plea and reply by the learned DPP, we sentenced the appellant to 20 years' imprisonment from date of arrest and ten strokes of the cane. Our
E reasons for doing so now follow. This will form the judgment of the court.

The Case For The Prosecution

[3] The prosecution called seven witnesses. The facts leading to the arrest of the appellant were set out in the judgment of the learned trial judge, as
F follows:

> Pihak pendakwaan telah memanggil seramai 7 orang saksi. Di mana saksi utama ialah SP4 iaitu L/Kpl Al'Hafiz bin Ibrahim yang merupakan pengadu di dalam report tangkapan dan menjumpai dadah (P12). Menurut keterangan SP4, beliau bertugas Task Force pada hari kejadian meronda
G mencegah jenayah di kawasan pentadbiran Pudu, Kuala Lumpur bersama-sama dengan dua rakan anggota iaitu Kpl. Azhar Yusof (SP6) dan L/Kpl. Muhamad Ubaidillah di Jalan Pria, Taman Maluri, Kuala Lumpur.
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> Pada jam 2.30 pagi semasa bertugas di tempat kejadian mereka telah menahan sebuah kereta nombor pendaftaran WXV 2134 jenis Proton
H Saga warna putih yang dipandu oleh tertuduh. Di dalam kereta tersebut hanya tertuduh sahaja berseorangan memandu tanpa penumpang.SP4 bertiga telah memperkenalkan diri sebagai polis dan meminta kad pengenalan tertuduh dan meminta tertuduh keluar dari kereta dan membuat pemeriksaan tubuh ke atas tertuduh tetapi tidak menjumpai sebarang barang salah.

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SP4 selepas itu membuat pemeriksaan di dalam kereta tertuduh dan tertuduh dikawal oleh SP6 dan L/Kpl Muhamad Ubaidillah. Pemeriksaan di bahagian tempat duduk pemandu, kerusi belakang dan di dalam booth belakang kereta tetapi gagal menemui apa-apa barang-barang salah. Apabila memeriksa di atas lantai di bawah kerusi penumpang hadapan SP4 terlihat satu beg merah (P10A).

SP4 telah membuka beg merah tersebut di hadapan tertuduh dan didapati di dalam beg merah mengandungi satu beg plastik (P10B) membaluti satu ketulan mampat. Bila dibuka P10B didapati satu kertas putih (P10E) dan dibaluti plastik lut sinar (P10D) yang diselotape (P10C) ketulan mampat tumbuhan kering dipercayai cannabis atau ganja. SP4 mengesyaki ianya ganja bukan sahaja dari bentuk mampat tumbuhan kering tetapi melalui baunya SP4 telah tahu ianya adalah ganja.

Tertuduh telah ditangkap dan dibawa balik tertuduh bersama beg merah berisi cannabis ke Balai Polis Pudu menggunakan kereta tertuduh dengan dipandu oleh L/Kpl. Muhamad Ubaidillah dan SP6 duduk bersebelahan pemandu dan SP4 mengawal tertuduh di kerusi belakang bersama-sama barang kes.

Di Balai Polis Pudu, SP4 telah membuat ujian air kencing ke atas tertuduh dan menimbang berat kasar bungkusan mampat seberat 998 gram dan lakukan penandaan barang-barang kes.

Menurut keterangan SP4, tertuduh tidak cuba melarikan diri semasa ditahan dan semasa dadah dijumpai di bawah tempat duduknya. Malahan semasa ditunjukkan bungkusan mampat tersebut tertuduh menafikan barang kes milik beliau dan tidak pula menyalahkan sesiapa sebagai pemilik bungkusan mampat itu. Semasa tangkapan SP4 tidak membuka kesemua balutan hanya lihat dari luar dan hanya melihat setakat plastik lut sinar P10D, pita pelekat P10C di dalam beg plastik putih P10B (Lihat gambar P4C).

Di Balai Polis Pudu SP4 ada membuat penandaan pada Balutan Bongkah sebagai A1, Plastik Putih A2, Beg Merah A3, dan selain itu ditulis tarikh dan tandatangan dengan menggunakan marker pen merah. SP4 ada menyediakan Borang Bongkar (P13) yang turut ditandatangani oleh beliau dan tertuduh.

Selepas itu SP4 telah menyerahkan tertuduh dan barang-barang kes yang tersenarai kepada Pegawai Penyiasat Insp. Ravindran a/l Krisnan (SP7). Keterangan SP4 di tempat tangkapan disokong oleh rakan setugasnya SP6 Kpl. Azhar bin Yusof pada malam itu turut membuat tugasan meronda bertiga dengan tiga buah motorsikal.

Menurut SP6 kereta tertuduh pandu ditahan sebab melanggar lampu isyarat di Jalan Pria. Menurut SP6 beliau mengawal tertuduh bersama Kpl. Ubaidillah semasa SP4 membuat pemeriksaan dan bahagian bawah kerusi penumpang hadapan adalah bahagian akhir diperiksa. Apabila SP4 membongkokkan tubuh melihat di bawah kerusi kereta dijumpai beg warna merah dan di dalamnya satu plastik putih dan bungkusan dibaluti plastik lut sinar dibaluti dengan sellotape. SP6 camkan melalui gambar P4 A & B dan barang kes tersebut P10 A, B, C dan E.

A Menurut SP6, beliau ada terbau dadah ganja semasa itu. Semasa membawa balik barang kes SP6 duduk di kerusi sebelah pemandu dan SP4 duduk di belakang dengan tertuduh dan barang kes. SP6 turut melihat SP4 membuat timbangan dan tandaan pada barang-barang kes, sediakan senarai bongkar, report polis dan serah menyerah dengan SP7 Pegawai Penyiasat.

B SP6 menyatakan bahawa semasa barang kes ditemui tertuduh tidak menamakan mana-mana orang yang tuan punya kepada dadah tersebut misalnya nama "Khalil" sehinggalah diserahkan tertuduh kepada Pegawai Penyiasat kes SP7.

C Pihak pendakwaan memanggil isteri tertuduh (SP5) iaitu Puan Abhinaaz Jehan binti Ammailaah Khan berumur 30 tahun. Kereta yang dijumpai dadah dan dipandu oleh tertuduh pada malam kejadian adalah didaftarkan di atas nama SP5. Namun menurut keterangan SP5 tertuduh yang menggunakan kereta tersebut selepas SP5 bersalin (17.1.2014) sehingga pada masa kejadian. Mereka tinggal berasingan di mana SP5 tinggal dengan adiknya sebab adalah masalah kewangan.

D Menurut SP5, beliau adalah pengidap sakit Tibi, dan hanya menggunakan kereta tersebut semasa untuk ke hospital sahaja dan suaminya (tertuduh) yang akan pandu dan tertuduh akan jemput SP5 di rumah adiknya sekerap 2-3 kali seminggu.

E Menurut SP5, beliau tidak pernah nampak barang kes di dalam gambar P4 dan bukan barang beliau. Beliau juga tidak ada meninggalkan apa-apa barang milik beliau di dalam kereta tersebut.

F Menurut SP5, kereta tersebut sehari sebelum kejadian kawan tertuduh bernama Khalil ada menggunakan kereta tersebut untuk memindahkan barang. SP5 tidak pasti sama ada, ada memberitahu pihak SP7 Pegawai Penyiasat akan ada seseorang bernama Khalil yang menggunakan kereta beliau untuk mengangkut barang. SP5 hanya berjumpa sekali sahaja dengan Khalil ini.

[4] The investigating officer SP7 sent the seized package for analysis of the
G contents. A chemist attached to Jabatan Kimia Malaysia, SP3, analysed the contents. SP2 confirmed that the contents contained 973g of cannabis which formed the subject matter of the charge against the appellant.

[5] At the end of the prosecution's case, although several issues were raised by counsel for the appellant at the trial, the learned trial judge found
H that a *prima facie* case had been established by the prosecution. Applying the cases of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 5 MLJ 1 and *Surentheran Selvarajah v. PP* [2005] 2 CLJ 264; [2006] 1 MLJ 641, the learned judge found that the appellant had custody and control of the illicit drugs as he was the only one in the car when the drugs were found. The learned judge also made a further contentious finding, which we will come back to later,
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when he observed: "Di dalam kes pada hari ini dadah yang terlibat adalah dari jenis cannabis yang mana sifatnya adalah berbau dan jika berada di dalam kereta beberapa jam ianya akan dapat diketahui ianya adalah ganja/ cannabis".

[6] It therefore seemed that the learned judge had come to a finding that the appellant had *mens rea* possession of the illicit drugs independently and without recourse to the statutory presumption under s. 37(d) of the Act. For the element of trafficking, however, the learned judge invoked the presumption of trafficking under s. 37 (da) of the Act after taking into account the weight of the drugs seized. The appellant was then ordered to enter his defence on the charge.

The Defence Case

[7] The appellant chose to give evidence on oath. His evidence was summarised by the learned trial judge as follows:

> Menurut tertuduh, beliau pada hari kejadian di waktu awal pagi hendak menziarahi abangnya yang keluar daripada hospital pada petang sebelumnya. Sebelum menuju ke rumah abangnya tertuduh telah singgah minum dan singgah di 'Up-Town' Bandar Tun Razak, Cheras dan selepas itu barulah tertuduh melalui jalan di mana beliau ditahan iaitu jalan pintas yang melalui Taman Maluri di Cheras. Semasa itu jam 2.30 pagi untuk menziarah abangnya yang sakit.
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> Tertuduh mengakui memandu kereta berseorangan dan ditahan oleh 3 orang polis berpakaian preman bermotosikal dan menunjukkan kad kuasa. Tertuduh mengakui pihak polis telah arahkan beliau mengeluarkan kad pengenalan dan lesen memandu. Selepas itu diarahkan keluar dari kereta. Menurut tertuduh beliau tidak tahu sebab beliau ditahan oleh polis.
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> Menurut tertuduh polis yang menahannya berpangkat Koperal bertanyakan tujuan tertuduh menuju ke mana, tertuduh memberitahu beliau dari Kajang menuju ke Desa Pandan ke arah rumah abang kandungnya untuk menziarah kerana baru keluar dari hospital sakit jantung.
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> Tertuduh mengakui pihak polis telah mengeledah keretanya dan beliau dikawal oleh 1 orang polis dan 2 lagi membuka dan mengeledah kereta beliau. Beliau juga memberi kebenaran sebelum itu untuk pihak polis memeriksa badannya.
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> Tertuduh mula memberi keterangan bercanggah pada masa beg merah dikatakan dijumpai oleh SP4 tersebut beliau berada di bahagian belakang bonet oleh itu tertuduh tidak mengetahui di mana sebenarnya dijumpai beg tersebut.

Menurut tertuduh sebelum beg merah dijumpai, pihak polis membuka dan memeriksa booth belakang kereta. Tertuduh mengakui memerhatikan pemeriksaan tersebut. Menurut tertuduh apabila polis melihat terlalu banyak barang di dalam booth kereta tersebut antaranya beg dan Iain-lain polis berkenaan telah bertanya kepada tertuduh kenapa banyak sangat barang di dalam booth keretanya, tertuduh menyatakan ianya milik isteri beliau.

Dalam keterangan SP5 isteri tertuduh di dalam kereta yang diambil oleh suaminya iaitu tertuduh mempunyai barang-barang yang ditinggalkan oleh SP6. Namun SP5 menafikan pernah melihat beg merah berisi bungkusan mampat dadah di dalamnya.

Menurut tertuduh lagi salah seorang anggota polis telah menarik tangan tertuduh dan menunjukkan sebuah ketulan mampat di atas kusyen penumpang dan menurut tertuduh beliau tergamam. Menurut tertuduh itulah kali pertama beliau melihat barang ketulan mampat dan beg merah tersebut di atas kerusi penumpang. Semasa barang dijumpai tertuduh hanya menyatakan bahawa bukan milik beliau dan hanya berada di Balai Polis barulah tertuduh memberitahu pihak polis bahawa beliau teraniaya:

> Setelah saya fikir-fikirkan, saya benar-benar teranianya atas sebab kelalaian saya sebelum ini kereta ini telah dipinjamkan untuk pemunggahan barang-barang di sebuah van yang telah rosak di tepi jalan untuk dipindahkan ke rumah tuan punya barang-barang itu. Mungkin boleh jadi saya memberitahu pada polis mungkin barang dia telah tertinggal di dalam kereta saya.

Menurut tertuduh pada sebelah petang tersebut 8 jam sebelum kejadian ditahan, seorang rakan tertuduh di tempat tertuduh sering makan meminta tolong tertuduh bersama Khalil dan pembantu Khalil memindahkan barangan milik Khalil dari van beliau yang rosak ke kereta tertuduh hanya satu jam setengah sahaja dari jam 4.00 petang hingga 5.30 petang.

Dari keterangan tertuduh ini kereta tersebut sentiasa dalam kawalan tertuduh di mana rakannya Khalil dan pembantunya bersama tertuduh yang memunggah barang-barang dari van ke kedai makan Khalil di Flat Cemara kerana Khalil tinggal di atas kedai makan tersebut. Dengan kata lain, tertuduh tahu di mana Khalil tinggal. Tertuduh juga dapat memberitahu dengan terperinci akan siapa pemilik kedai makan tersebut iaitu bapa saudara kepada Khalil seorang mamak.

Namun isteri tertuduh walaupun diberitahu oleh tertuduh akan peristiwa sebelah petang tetapi masih tidak dapat sahkan tempat tinggal Khalil tersebut dan agak-agak sahaja. Malah, tertuduh tidak dapat sahkan siapa pembantu Khalil tersebut.

Tertuduh dengan terperinci memberitahu akan letaknya van yang diparking di tepi bahu jalan di Taman Anggerik, Cheras. Menurut tertuduh van tersebut milik Khalil yang berkerja dengan sebuah syarikat

pemasangan Astro. Menurut tertuduh lagi beliau telah menolong mengangkat barang-barang dari van Khalil ke dalam kereta tertuduh. Barang-barang terdiri dari sebuah televisyen, berbelas-belas beg saiz sederhana dan kecil dan sebahagian gulung wire dan kabel.

Menurut tertuduh, setelah selesai urusan tersebut beliau minum dan makan di kedai makan Khalil dan terus pulang ke rumah emaknya di Kajang, Taman Cheras Jaya, Balakong.

Menurut tertuduh apabila beliau memberitahu polis bahawa barang kes tersebut milik Khalil, polis menawarkan agar dibawa mereka ke tempat Khalil berada. Pada mulanya pihak polis bersetuju selepas itu mereka tidak endahkan untuk mencari Khalil.

[8] At the conclusion of the trial, the learned judge did not accept the explanation of the appellant that he had no knowledge of the drugs. From the grounds of judgment, it appeared that the learned judge did not believe in the existence of this character Khalil as told by the appellant and his wife SP5. The learned judge found that the appellant had failed to raise a reasonable doubt in the case for the prosecution. The appellant was accordingly found guilty, convicted and sentenced to death.

The Instant Appeal

[9] Before us, although several grounds were listed in the petition of appeal, learned counsel for the appellant attacked the findings of the learned trial judge on a pivotal issue involving the question of possession and knowledge of the impugned drugs. The criticism that was fashioned before us was that there was no finding at all by the trial court as to possession of the impugned drugs. Thus, it was contended that there was a non-direction which amounted to a misdirection in law.

[10] On this score, admittedly the judgment of the learned judge is imprecise as to the exact nature of the finding of possession. What is however certain is that the learned judge did not at all allude to the presumption of knowledge under s. 37(d) of the Act. In such a situation, we agree that we should consider the evidence as a whole to ascertain if a finding of *mens rea* possession can be supported.

[11] In this respect, the law with regards to possession and knowledge is trite in that mere custody and control is not sufficient to prove possession under the Act. There must be proof that the appellant had knowledge of the illicit drugs. Unless the accused person confesses to knowledge of the illicit drugs, knowledge can only be inferred from proved facts and circumstances (see *Chan Peon Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237; *Wong Nam Loi v. PP* [1998] 1 CLJ 37; *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 4 AMR 269; *Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 and *Fakhrurrazi Hasan v. PP* [2017] 2 CLJ 125).

[12] In *Sia Swee Siong v. PP*, Criminal Appeal No. M-05(M)-241-06-2016, this court had occasion to observe that what constitutes possession under the Act is a question of law. However, whether possession has been proved in a given case is a question of fact. The facts and circumstances which are relied upon to prove possession can vary from case to case such that an over-reliance and fixated approach on the facts of other cases can lead to confusion and sometimes error.

[13] The crucial issue which lies at the heart of this appeal is whether the appellant had knowledge of the drugs that were recovered. In this context, the question is whether the learned trial judge was entitled to come to a finding that the appellant had knowledge of the illicit drugs based purely on the surrounding facts and circumstances. In this respect, the learned trial judge relied on the case of *PP v. Abdul Rahman Akif, supra*, which the learned judge observed had the same facts as the instant case.

[14] Now, apart from the fact that the drugs were found in a car, could it be said that the facts are identical? In *Abdul Rahman Akif, supra*, the relevant facts were these. Three packages of drugs of cannabis were found in the car driven by the accused. They were all wrapped in newspapers. One package was under the driver's seat whilst two were under the front passenger's seat. The net weight of the cannabis was 4826.9g. The High Court found that there was possession based on the confession of the accused in his cautioned statement. On appeal, the Court of Appeal decided that the trial judge ought not to have admitted the cautioned statement into evidence. The court held that the charge of trafficking could not be sustained. The conviction and sentence was set aside and substituted with conviction for the offence of possession.

[15] On appeal to the Federal Court, it was held that the Court of Appeal was right to invoke the s. 37(d) presumption of the Act. In this context, Arifin Zakaria FCJ (later Chief Justice), speaking for the Federal Court observed (at p. 352 (CLJ); p. 280 (MLJ)):

> It is true that the trial judge did not make any finding on the issue of knowledge necessary to establish possession of the drugs, as he relied on the cautioned statement in coming to his finding. The Court of Appeal on the facts correctly found that there was sufficient evidence to find the respondent to be in custody and control of the 3 packages found in the car and relying on the presumption under s. 37(d) of the Act the Court of Appeal went on to hold that the respondent was in presumed possession of the drug.

[16] However, what is pertinent is that the Federal Court went on to say that from the evidence, it was clear that, from the manner the drugs were hidden, little effort was required to uncover what were in the three packages and as such it was held that possession was proven independent of the s. 37(d) presumption.

[17] Reverting to the instant case, we agree that the facts are clearly distinguishable. It is not disputed that it took some effort for the police witnesses to locate the drugs under the front passenger seat next to the driver's seat. This was noted by the learned judge as follows in the judgment (at p. 3):

> SP4 selepas itu membuat pemeriksaan di dalam kereta tertuduh dan tertuduh dikawal oleh SP6 dan L/Kpl Muhamad Ubaidillah. Pemeriksaan di bahagian tempat duduk pemandu, kerusi belakang dan di dalam booth belakang kereta tetapi gagal menemui apa-apa barang-barang salah. Apabila memeriksa di atas lantai di bawah kerusi penumpang hadapan SP4 terlihat satu beg merah (P10A).
>
> SP4 telah membuka beg merah tersebut di hadapan tertuduh dan didapati di dalam beg merah mengandungi satu beg plastik (P10B) membaluti satu ketulan mampat. Bila dibuka P10B didapati satu kertas putih (P10E) dan dibaluti plastik lut sinar (P10D) yang diselotape (P10C) ketulan mampat tumbuhan kering dipercayai cannabis atau ganja. SP4 mengesyaki ianya ganja bukan sahaja dari bentuk mampat tumbuhan kering tetapi melalui baunya SP4 telah tahu ianya adalah ganja.

[18] Further, unlike the case of *Abdul Rahman Akif*, the drugs in the instant case were in a red bag and also wrapped up completely such that more effort was again required to uncover the drugs contained in the package. Given the circumstances, we were more inclined to accept that the more appropriate way to impute knowledge of the appellant was through the use of the s. 37(d) presumption.

[19] Now, the learned judge appeared to have placed some emphasis on the fact that the cannabis would emit a smell such that the appellant would know of the cannabis in the car, an observation we had alluded to earlier in the judgment. In this connection, there was no evidence whatsoever that the cannabis had left a smell such that anyone entering the car would have sensed it. SP4 was only able to smell the cannabis after it had been uncovered from the package. If what the learned judge observed was indeed the case, the police officers inspecting the car would have said so in their evidence and more importantly would have zeroed in on the incriminating package based on the smell instead of having to exert some effort in locating the incriminating package. In the end, the package was located not because of any smell but due to the diligence of the officers. One of the officers, SP6, even agreed in his testimony that during the inspection of the car, there was

A no smell of ganja (cannabis) emanating from the car. There was therefore, with respect, no basis for the learned judge to make his observations which, given that no such evidence was adduced at the trial, were most unfortunate.

[20] In the circumstances, we agree that there was no factual matrix adduced by the prosecution to infer that the appellant had knowledge of the
B illicit drugs in the car. The upshot is that the learned judge erred in finding that the appellant had knowledge of the drugs by way of inferences and from the circumstances of the case. We accept that the appropriate way to prove knowledge in the present case was to invoke the knowledge presumption under s. 37(d) of the Act (see *PP v. Tan Tatt Eek* [2005] 4 CLJ 460; [2005]
C 6 AMR 543 and *Soorya Kumar Narayanan & Anor v. PP* [2012] 9 CLJ 141).

Conclusion

[21] In the circumstances, and for the reasons we have provided, the learned judge ought to have invoked the presumption under s. 37(d) of the
D Act and called upon the appellant to enter his defence only on an amended charge of possession under s. 6 of the Act and not trafficking. We agree that trafficking had not been proved as there was only evidence of passive possession on the part of the appellant.

[22] Considering the entirety of the evidence, we held without hesitation
E that the appellant had failed, on a balance of probabilities, to rebut the presumption of possession of the dangerous drugs. Accordingly, we had set aside the conviction and death sentence of the High Court, and substituted it with a conviction under s. 6 punishable under s. 39A(2) of the Act. After hearing the mitigation of the appellant and the reply by the learned Deputy
F Public Prosecutor, we sentenced the appellant to 20 years' imprisonment with effect from the date of his arrest and ten strokes of whipping.

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